No. 92-94

In The

Supreme Court of the United States

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE CHRISTIAN LEGAL SOCIETY, THE NATIONAL ASSOCIATION OF EVANGELICALS, THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE USA, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, THE FAMILY RESEARCH COUNCIL, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, JONI AND FRIENDS, AND THE LUTHERAN CHURCH-MISSOURI SYNOD AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

The interest of each *amicus curiae* is set forth in the appendix hereto. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.3.

ARGUMENT

This case raises the deepest problem in the interpretation of the Religion Clauses of the First Amendment: How do the free exercise and nonestablishment principles interact? Are the two Clauses mutually contradictory or mutually reenforcing? Do they serve the same end (the protection of religious freedom) or different ends? The Ninth Circuit concluded that the Establishment Clause would be violated if the State provided a sign language interpreter to a deaf student attending a religious school (Pet. App. A7-A13), that the Free Exercise rights of the student and his parents are burdened if the state denies the interpreter (*id.* at A14), and that the Establishment Clause trumps the Free Exercise Clause (*id.* at A14-A15). In other words, the Establishment Clause means the opposite of the Free Exercise Clause, and the Establishment Clause predominates where there is a conflict.

We believe this view of the Religion Clauses is fundamentally misguided. We believe the two Clauses are harmonious and mutually reenforcing provisions with the central and unifying purpose of protecting the freedom of religion, and that interpretations of the Establishment Clause which appear to create the conflict should be reconsidered and revised.

Petitioner, Jimmy Zobrest, is a profoundly deaf high school student who is entitled under law to the services of a sign language interpreter. The school district stipulated at trial that the State would provide the interpreter if he attended a public *or private* secular school. Pet. App. A4, A5. The court of appeals held that the Establishment Clause requires the State to deny these services to Jimmy *solely because he and his family exercised their constitutional*

right to choose a religious education. The court of appeals explicitly recognized that this discrimination against religion would in ordinary circumstances be *prohibited* by the Free Exercise Clause, but interpreted one constitutional provision as requiring violation of another. The court's extreme and destructive interpretation of the Establishment Clause highlights the tendency of an uncritical application of this Court's Establishment Clause precedents to mislead and generate wrong – indeed, outrageous – results.

Under a proper interpretation of the First Amendment this is an easy case. Allowing Jimmy to use the interpreter at an accredited school of his choice does not advance but is neutral toward religion: Jimmy's family is free to decide, without reward or penalty, whether he will be educated in an environment that accords with their religious faith. Conversely, to forbid the use of the interpreter at a religious school is not neutral toward religion but discriminatory against religion: the denial of the interpreter is effectively a penalty on the Zobrests for the exercise of their faith, with no conceivable justification other than the State's erroneous view of the Establishment Clause.

Unfortunately, under current doctrine this is *not* an easy case. The state officials administering the program, the district court, and the court of appeals all concluded that it would violate the Establishment Clause for the State to provide an interpreter for Jimmy's use at the school of his choice. The same conclusion was reached by the Court of Appeals for the Fourth Circuit in a similar case. *Goodall By Goodall v. Stafford County School Bd.*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 188 (1991). Presumably, these officials and courts were conscientiously attempting to apply First Amendment precedents as they understood them. The result below is not a mere aberration, but a symptom of deep and serious misconceptions about the nature of religious freedom under the First Amendment. Those misconceptions are having an impact far beyond the narrow confines of this case. The

idea is abroad in the land that religious influences must be surgically removed from all areas of life in which the government is involved, producing not neutrality and pluralism in the public sphere but what Justice Goldberg called "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion). This Court must correct those elements in current doctrine that have led to results so clearly at odds with the purposes of the First Amendment.

I. The Two Religion Clauses Should Be Read As Complementary Rather Than Contradictory

As many Justices of this Court have observed, current interpretations of the Free Exercise and Establishment Clauses of the First Amendment appear to create a "tension" between the Clauses. *Wallace v. Jaffree*, 472 U.S. 38, 81-82 (1985) (O'Connor, J., concurring); *Thomas v. Review Bd.*, 450 U.S. 707, 720-21 (1981) (Rehnquist, J., dissenting); *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970); *Sherbert v. Verner*, 374 U.S. 398, 414 (1963) (Stewart, J., concurring). The Free Exercise Clause forbids Congress (and, after incorporation through the Fourteenth Amendment, *any* government) to discriminate against religion. The Establishment Clause has been interpreted to forbid the government to aid or advance religion. In a world in which the government aids or advances many different causes and institutions, this means that the government *must* discriminate against religion in the distribution of benefits. Thus, the Establishment Clause is said to require what the Free Exercise Clause forbids.

This case provides an excellent opportunity for this Court to resolve that tension and restore an interpretation of the Religion Clauses that is complementary and harmonious. The prohibition of religious establishments and the guarantee of free exercise do not mean opposite

things. Rather, they serve as mutually reenforcing protections for religious liberty. *Wallace v. Jaffree*, 472 U.S. at 68 (O'Connor, J., concurring). As Justice Goldberg put it in *Schempp*:

> These two proscriptions are to be read together, and in light of the single end which they are designed to serve. The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.

374 U.S. at 305 (concurring opinion). The Establishment Clause guarantees that government power will not be used to foster or induce the exercise of religion in general, or of any particular religion; the Free Exercise Clause guarantees that government power will not be used to penalize or suppress the exercise of religion in general, or of any particular religion. Together, the Religion Clauses guard against the use of government power to control, interfere with, reward, or punish the institutions, beliefs, and practices of religion.

A contradictory interpretation of the two Religion Clauses is not historically supportable. The framers of the First Amendment did not view the two parts of the Religion Clauses as separate and independent – let alone as mutually incompatible. It is anachronistic to view free exercise as protecting religion from government and nonestablishment as protecting government from religion. The two principles were advocated with equal fervor by the same persons (particularly Baptists and other fervent Protestant sects) and for essentially the same reason: to diminish government power and control over religion. Historian Thomas Curry explains that "[c]ontemporaries did not . . . distinguish between religious oppression as falling under the ban of the 'free exercise' clause and a general assessment as being prohibited by the 'establishment' clause." Indeed, "to see the two clauses as separate,

balanced, competing, or carefully worked out prohibitions designed to meet different eventualities would be to read into the minds of the actors far more than was there." Thomas Curry, *The First Freedoms* 216, 217 (Oxford, 1986). The two Clauses were a unified whole – "a double declaration of what Americans wanted to assert about Church and State." *Id.*

Moreover, to treat the two parts of the First Amendment that address the relation between government and religion as inconsistent is not only improbable as a matter of ordinary language and intent, but is jurisprudentially incoherent. The function of judicial review rests on the proposition that the Constitution is supreme law, and that statutes or governmental practices, being subordinate to the Constitution, cannot be enforced or implemented if they are inconsistent with the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). If two provisions of the Constitution are in conflict, the courts have no basis for deciding between them.[1] The Ninth Circuit attempted to resolve this problem simply by subordinating the Free Exercise Clause to the Establishment Clause:

> Here, denial of aid to the Zobrests does impose a burden on their free exercise rights. . . . However, . . . [t]he government has a compelling interest in ensuring that the Establishment Clause is not violated. It is difficult to imagine a more compelling interest than avoiding a violation of the Constitution.

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[1] This is not to deny that some applications of some constitutional provisions may seem to conflict in particular circumstances; for example, freedom of the press can on occasion seem to conflict with the necessities of a fair trial. *E.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). But the supposed conflict between free exercise and nonestablishment is of a different order: as interpreted by the court below, the two Clauses occupy the same field but they mean different things. That is, the conflict between the Clauses is at the core, not in particular unusual applications.

Pet. App. A14-A15. Of course, it would be just as logical to say that, in a conflict, the Free Exercise Clause must prevail. *See* Laurence Tribe, *Constitutional Law*, § 14-4, at 1168 (2d ed. 1988) (contending that actions "arguably compelled" by the free exercise clause "are not forbidden by the establishment clause"). The court of appeals offered no explanation for choosing to elevate one Clause and not the other.

Such contradictions are a sure sign of analytical error. To say that a single governmental act (refusing to supply an interpreter) is both a burden on the free exercise of religion *and* necessary to avoid an advancement of religion suggests that the court is using inconsistent understandings of "advancement" and "burden." If it appears that the two Clauses point in opposite directions, that is a strong warning that at least one of the two Clauses has been misinterpreted.

II. The Inconsistency Is Caused By The Ninth Circuit's Understanding Of The Establishment Clause

In theory, the conflict between the Religion Clauses perceived by the court below might be attributed to a mistaken construction of either or both. But the Ninth Circuit's conclusion that denial of an interpreter to Jimmy Zobrest imposed a burden on his free exercise rights is unassailable; the conflict is created by its understanding of the Establishment Clause.

Technically, this Court need not reach petitioner's free exercise claim as such. He is entitled to the services of the interpreter under federal and state statute, and the only reason respondent or the lower courts have supplied for denying the interpreter is that it would supposedly violate the Establishment Clause.[2] If this Court reverses

[2] It is ironic that, in a day that Congress has enacted the Americans With Disabilities Act and the Education of Handicapped Children Act to *alleviate* prejudice and discrimination against the disabled, the court below has construed the Constitution to *mandate* such discrimination in the name of religious freedom.

the decision below on the establishment issue, petitioner will prevail; the free exercise claim is not necessary to his case.[3] Nonetheless, the free exercise issue is central to the correct disposition of the establishment issue. The most obvious reason to reject the lower court's interpretation of the Establishment Clause is that it would violate petitioner's free exercise rights under any conceivable understanding of the latter Clause.

There is no doubt that seeking an education under religious auspices is a right protected under the Free Exercise Clause. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 788 (1973); *see Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Moreover, there is no doubt that, in this case, a valuable benefit was withheld *solely* because of the exercise of that right. If Jimmy had chosen to attend an equally appropriate private school devoted to progressive politics, feminism, militarism, or Afrocentrism, the State would have provided a sign language interpreter. Because the values espoused by his school are religious, however, Jimmy forfeited this valuable benefit. This is in plain violation of the Free Exercise Clause as interpreted in *Employment Division v. Smith*, 494 U.S. 872 (1990). According to this Court in *Smith*, the government may

[3] In the Brief in Opposition to Pet. for Cert. (at 13), respondent for the first time sought support for its decision from 34 C.F.R. § 76.532. That regulation, however, is best understood as a regulatory embodiment of the requirements of the Establishment Clause. To the extent that it might be read to deny statutorily-mandated benefits that are *not* impermissible under the Establishment Clause, it would undercut statutory requirements without statutory warrant and would raise issues under the Free Exercise Clause. In the unlikely event that this Court should accept respondent's construction of the regulation, it would be necessary to consider petitioner's free exercise claim directly.

not "impose special disabilities on the basis of religious views or religious status" (*id.* at 877) and any law or governmental action that is "specifically directed at . . . religious practice" is subject to strict scrutiny. *Id.* at 878. Here, the State has singled out students who attend religious schools for a special disability. The prohibition is "specifically directed at religious practice" and thus falls within the core of the protections of the Free Exercise Clause.[4]

In *McDaniel v. Paty*, 435 U.S. 618, 626 (1978), this Court held that the Free Exercise Clause does not permit a state to withhold a civil privilege or benefit on account of a person's exercise of the constitutional right to freedom of religion. A state may not "condition the exercise of one [right] on the surrender of the other." *Id.* In this respect, the protection accorded the free exercise right is parallel to that accorded other constitutional rights. *See, e.g. Rutan v. Republican Party*, 497 U.S. 62 (1990) (state may not condition employment on support for a political party); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (state may not condition permit on relinquishment of constitutionally protected property rights); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (government may not condition subsidy on agreement of broadcaster not to editorialize); *Speiser v. Randall*, 357 U.S. 513 (1958) (state may not condition tax benefit on willingness to sign loyalty oath). Here, the question is whether the state may condition the statutory right to special educational services on the surrender of the free exercise right to obtain one's education in an accredited parochial school. As the Ninth Circuit recognized, the Zobrests "will have either to forgo a sectarian education for James in order to receive the assistance of a sign language interpreter for

[4] *Amici* do not suggest that respondent would be unconstitutionally discriminating against religion if it provided interpreters only in public schools. The First Amendment prohibits discrimination on the basis of religion – not discrimination between government-operated and private institutions.

him at school, or they will have to pay the cost of the interpreter's services themselves, while keeping him at [the religious school]." Pet. App. A14. This violates the Free Exercise Clause.[5] *Cf. Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (the state's policy "forces [petitioners] to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order [to obtain generally available benefits], on the other hand").

The Ninth Circuit was unquestionably correct that denial of an interpreter in this case violated petitioners' free exercise rights. Accordingly, we must examine the court's construction of the Establishment Clause to determine the source of the conflict.

III. As Interpreted By The Court Below, The Three-Part Test Of *Lemon v. Kurtzman* Is The Source Of The Conflict Between Free Exercise And Non-Establishment

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), this Court announced a three-part test for identifying an establishment of religion. Although in recent cases the Court has resolved establishment questions without actual reliance on the *Lemon* test, *Lemon* has neither been jettisoned nor modified. In the state and lower federal courts it remains the predominant – if not the only – test for identifying an establishment of religion. While the *Lemon* test has been criticized frequently by commentators as well as members of this Court, the Court has not come to grips with the inherent inconsistency between

[5] Moreover, although the analysis is supererogatory here, petitioners' right is also a "hybrid" right as defined in the *Smith* opinion, 494 U.S. at 881-82. Like *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this case involves both free exercise of religion and the due process right of parents to control the education of their offspring. See *Smith*, 494 U.S. at 881.

the test (at least in its common interpretation, as exemplified by the decision below) and the right of free exercise.

Amici would like to make clear that we do not criticize the *Lemon* test because we believe that the government should have greater discretion to foster or encourage favored forms of religious practice. On the contrary, these *amici* are committed to the proposition that the use of government power to advantage any particular view of religion (for or against) is injurious to true religion as well as to the American constitutional order. We thus respect the motives of those on and off the Court who have adhered to *Lemon* as a means of cabining government power over religion. But as this case plainly demonstrates, *Lemon* is a deeply flawed test for achieving this worthy objective. Unless modified or redefined, the *Lemon* test inevitably produces unnecessary and destructive conflicts between the principles of free exercise and nonestablishment.

The *Lemon* test holds that a statute or government practice (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not entail an excessive entanglement between religion and government institutions. In this case, the "secular purpose" requirement was easily satisfied and uncontroversial. We therefore will focus entirely on "effect" and "entanglement."

A. Effect

An effects test is an indispensable part of the analysis of establishment, but it is essential to specify what kind of "effect" is problematic. The principal cause of the conflict in interpretations of the two Religion Clauses has been the conflicting approaches to determining what the effect of government action on religion is. There are two basic problems. First, the test does not distinguish between *governmental preference* for religion and *private*

religious use of neutral and generally available governmental benefits. Properly understood, the former raises an establishment issue; the latter does not. When, as in the decision below, courts interpret *Lemon* as prohibiting private religious uses of generally available benefits, the effect is to require actual discrimination *against* religion. Second, the test does not distinguish between government action that facilitates or removes obstructions to genuinely private choices, which should be upheld as legitimate accommodations of religion, and government action that fosters and induces the exercise of religion, which is the essence of establishment.

We therefore submit that the effects test should be recast as follows: the Establishment Clause prohibits government action that accords religious institutions or activities preferential treatment over nonreligious alternatives in a way that would induce or promote religious exercise.

1. Governmental preference versus neutrality

The most frequently recurring factual pattern in Establishment Clause cases involves government programs that extend various forms of aid or assistance – cash, in-kind benefits, access to government facilities or property, tax benefits – to a range of institutions, ideas, or activities, religious as well as secular. The question is whether participation by religious individuals or institutions on equal and nondiscriminatory terms is a violation of the Establishment Clause. In all candor, the Court's answers to that question have not been consistent. In one line of cases, beginning with *Bradfield v. Roberts*, 175 U.S. 291 (1899), and *Everson v. Board of Education*, 330 U.S. 1 (1947), and most recently including *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court permitted the participation of religious institutions and individuals so long as the terms of the program were neutral. In another line of cases, beginning with *Lemon* itself and most recently including *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*,

473 U.S. 402 (1985), the Court barred religious institutions and the individuals using them.

While it is possible, with tortured logic, to distinguish and reconcile many (though not all) of these decisions, at bottom these two lines of cases rest on different and irreconcilable understandings of what it means for government action to "advance religion."[6]

Under one approach (which we will call for convenience the "governmental neutrality" approach), the key question is whether the government has favored religion over nonreligion in setting the terms of the program or in administering it. If aid is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted, and is in no way skewed toward religion," it does not violate the Establishment Clause. *Witters*, 474 U.S. at 487-88 (citation omitted). *See also Board of Education v. Mergens*, 496 U.S. 226 (1990); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989);

[6] In *Grand Rapids*, the Court attempted to reconcile the precedents through a distinction between "direct" and "indirect" aid to religion. 473 U.S. at 393-94. Close examination of the cases, however, reveals that these terms are labels for the result rather than tools for analysis. It is hard to see, for example, why the loan of textbooks to parochial schools is "indirect" (*Board of Education v. Allen*, 392 U.S. 236 (1968)), while the loan of instructional materials is "direct" (*Wolman v. Walter*, 433 U.S. 229, 248-51 (1977)); why cash grants to religious colleges are "indirect" (*Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976)), while cash grants to religious high schools for secular purposes are "direct" (*Levitt v. Committee for Public Education*, 413 U.S. 472 (1973)); or why some tax benefits for parents whose children attend religious school are "indirect" (*Mueller v. Allen*, 463 U.S. 388 (1983)), while others are "direct" (*Sloan v. Lemon*, 413 U.S. 825 (1973)). The Court admitted in *Grand Rapids* that the precedents do *not* distinguish between "aid [that] was formally given to parents and not directly to the religious schools" or between cash grants and in-kind assistance. 473 U.S. at 394. We submit that there is no definition of "direct" and "indirect" that makes sense of these cases.

Mueller v. Allen, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Walz v. Tax Commission*, 397 U.S. 664 (1970). This approach rests on two conceptual foundations. First, the "effect" of government action must be evaluated in the context of the program as a whole. The constitutional principle is that the government may not favor religion over nonreligion, or one religion over another. The First Amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary." *Everson*, 330 U.S. at 18. In other words, the issue of "advancement" is relative: does the government "advance" religion as compared to nonreligious alternatives?

The second premise of the "governmental neutrality" view is that the Establishment Clause is concerned only about *government* action fostering religion. The Establishment Clause does not prohibit (and the Free Speech and Free Exercise Clauses protect) private religious speech and activity, even within the context of government programs or aid. *Board of Education v. Mergens*, 496 U.S. at 250; *cf. Lee v. Weisman*, 112 S. Ct. 2649, 2655, 2657-58 (1992). "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original).

An excellent example is *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). In *Witters*, the state provided funds to assist blind persons to train for useful occupations. One eligible individual, Larry Witters, wished to study for the ministry at a Bible college. The state supreme court held that the provision of governmental assistance to enable someone to study for the ministry violated the Establishment Clause (*id.* at 485), but this Court unanimously reversed. Following the "governmental neutrality" approach, this Court held that

the assistance "is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted,' " that it "creates no financial incentive for students to undertake sectarian education," that it "does not tend to provide greater or broader benefits for recipients who apply their aid to religious education," and that "the decision to support religious education is made by the individual, not by the State." *Id.* at 488 (citations omitted).[7] In other words, since the government action was neutral, neither favoring nor disfavoring religion, the specific use to which the assistance was put was a private matter. In Justice Powell's words: "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries." *Id.* at 490-91 (concurring opinion).[8]

On the same reasoning, the Court has upheld participation by churches in broadly available tax benefits (*Walz, supra*), the use of tax deductions for expenses in religious as well as nonreligious schools (*Mueller, supra*), and the use of public university facilities by a religious

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[7] The Court also noted that the funds were "paid directly to the student" rather than to the religious institution (474 U.S. at 487), which is a fact in common with the instant case. This detail is not, however, of particular importance. In *Grand Rapids* the Court correctly observed that whether aid is "formally given to parents and directly to religious schools" is a mere "difference[] in form" that should not control the outcome. 473 U.S. at 394. What matters is the reality: whether the government acts neutrally, leaving decisions regarding religious uses to the private individuals involved.

[8] Justice Powell's concurring statement won the support of a majority of the Justices in *Witters*. The Chief Justice and Justice Rehnquist joined Justice Powell's opinion, and two others endorsed it in their separate opinions. *See* 474 U.S. at 490 (White, J., concurring); *id.* at 493 (O'Connor, J., concurring).

student group for prayer, Bible study, and religious discussion. *Widmar, supra.* Most recently, in *Texas Monthly*, the Court stated the principle as follows: "Insofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." 489 U.S. at 14-15.

Under the other approach (which we will call the "religious uses" approach), the key question is whether government resources have been used to foster or inculcate religion. *See Grand Rapids School District v. Ball*, 473 U.S. at 385 (the Establishment Clause "does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *Levitt v. Committee for Public Education*, 413 U.S. 472, 480 (1973) ("the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination."). The underlying theory is that taxpayers may not be compelled to support religious activity, even pursuant to neutral and generally available benefit programs.

These approaches are obviously inconsistent. If it were true that state resources may not be used for religious instruction or activity, *Widmar, Walz, Mueller, Witters*, and the principle stated in *Texas Monthly* would all be wrong. In each of those cases, public resources were made available on neutral grounds to individuals or groups, who then used those resources to advance their religious objectives. If religious uses are unconstitutional, those cases were wrongly decided. Conversely, if nondiscriminatory provision of assistance to all eligible persons on the basis of neutral and objective criteria is constitutional, then many of the decisions that have followed *Lemon* were wrongly decided, including, most recently and prominently, *Grand Rapids* and *Aguilar*.

It should be evident that the "religious uses" approach is responsible for creating the conflict with the

Free Exercise Clause, for the Free Exercise Clause does not permit the government to deprive its citizens of generally available benefits on account of their religious activities or commitments. *Employment Division v. Smith, supra; McDaniel v. Paty*, 435 U.S. at 626; *see Everson*, 330 U.S. at 16 ("we must be careful, in protecting the citizens . . . against state-established churches, to be sure that we do not inadvertently prohibit [the State] from extending its general state law benefits to all its citizens without regard to their religious belief"); *Board of Education v. Mergens*, 496 U.S. at 248 (exclusion of religious groups "would demonstrate not neutrality but hostility toward religion"); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1007-08 (1990). The government neutrality approach, by contrast, is consistent and harmonious with the dictates of the Free Exercise Clause. The Establishment Clause does not require, and the Free Exercise Clause does not permit, government to discriminate against otherwise eligible institutions or individuals in the administration of public programs on the basis of their religious character or commitments.[9] The belief that the government must discriminate against religious uses in the administration of public programs converts the Establishment Clause from a guarantor of civil liberty into an

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[9] This analysis applies only to programs that provide assistance to a broad range of persons on a general basis. It does not apply to programs in which the government makes specific grants to selected persons or groups to convey opinions and messages from the government to the public. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988) (grantees under the Adolescent Family Life Act are not entitled to teach or promote religion within the scope of the program); *cf. Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (grantees under Title X are not entitled to promote or counsel abortion within the scope of the program). In such cases, the recipient of funds is effectively the mouthpiece for the government and is therefore restrained by the Establishment Clause.

instrument for discrimination and intolerance toward religion.

This case is a clear example. Ouf of the many thousands of deaf children who are provided interpreters under federal and state law, and the many hundreds of thousands who are provided other services to help them to receive an appropriate education notwithstanding their disabilities, only a small fraction would use those services in a religious context. These programs are utterly nondiscriminatory. But for the erroneous interpretation of the Establishment Clause, which has interfered with their neutral administration, the statutes extend their benefits to all eligible citizens without regard to the students' religious activities and commitments or the religious elements in their chosen educational program. Yet the Ninth Circuit held that the "primary effect" was to advance religion.

The Ninth Circuit identified two effects of providing an interpreter that it said would "advance religion." First, since the interpreter would assist Jimmy during the entire school day, including morning mass (should Jimmy choose to attend), religion classes, and other classes in which religious insights are incorporated into the curriculum, "[t]he interpreter would be the instrumentality conveying the religious message and experience." Pet. App. A10. Second, "[b]y placing its employee in the sectarian school to perform this function, the government would create the appearance that it is a 'joint sponsor' of the school's activities" and thus create a "symbolic union of government and religion in one sectarian enterprise." *Id.*

This conclusion is the *reductio ad absurdum* of the "religious uses" approach to interpreting the Establishment Clause. If the provision of sign language interpreters to deaf students is viewed realistically, it is obvious that the "primary effect" is to facilitate education and the effect on religion is entirely incidental to its secular purposes. The provision of sign language interpreters to all eligible students on a nondiscriminatory basis "creates no financial incentive for students to

undertake sectarian education. It does not tend to provide greater or broader benefits for recipients who apply their aid to religious education." *Witters*, 474 U.S. at 488. In short, viewed as a whole, the program is neutral: it leaves all choices with respect to education to the individual. Similarly, the program creates no appearance of a "symbolic union" of government and religion. The neutral terms of the program and the broad spectrum of beneficiaries "counteract any possible message of official endorsement of or preference for religion or a particular religious belief." *Mergens*, 496 U.S. at 252. Indeed, the message that is conveyed by a nondiscriminatory program "is one of neutrality rather than endorsement." To single out students who choose religious education "would demonstrate not neutrality but hostility toward religion." *Id.* at 248.

We submit that this Court should adopt the "government neutrality" approach and should explicitly repudiate the "religious uses" approach. The purpose of the First Amendment is to reduce government power and influence over religious decisions – not to place a thumb on the scales in opposition to religion. If aid is extended to a wide range of individuals, activities, or institutions, without regard to the religious-nonreligious nature of the use to which it will be put, and is not skewed in favor of religion, then the program should be considered neutral and permissible under the effects test of *Lemon*. *See Witters*, 474 U.S. at 487-88. Under this approach, the courts need not examine the use to which an individual puts the benefits he receives from the state. The constitutional inquiry is satisfied if the *state* has not favored religion over nonreligion or created incentives for the practice of religion. Private choices – even in the context of neutral government benefits – do not implicate the Establishment Clause.[10]

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[10] In addition to reconciling the two Religion Clauses, this approach has the considerable additional benefit of bringing the Establishment Clause into conformity with definitions of "state action" for purposes of other constitutional principles under the Fourteenth Amendment. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (employment decisions of private school receiving government grants are not "state action" where they were not "compelled or even influenced by any state regulation"); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *West v. Atkins*, 487 U.S. 42 (1988). The Establishment Clause limits the power of the government to promote or engage in religious activity; where the impetus for religious activity is purely private (even if government-assisted under a neutral funding scheme) there is no "state action."

2. *Inducements versus accommodation*

The second conceptual problem with the effects test of *Lemon* that produces a conflict with free exercise is the failure to distinguish between programs that "advance religion" in the sense of creating incentives to choose to exercise religion instead of not exercising religion, and those that "advance religion" in the sense of allowing individuals a greater latitude to decide whether or not to exercise religion. When a program advances religious *choice* it should not be deemed to violate the Establishment Clause.

This should be obvious in a program like the provision of educational services to handicapped children. To the extent that the neutral provision of sign language interpreters has an effect on religion, it is to enable families like the Zobrests to make their own decisions about whether to seek a religious education. The decision below, by contrast, imposes a powerful disincentive to making the religious choice. If the Zobrests choose the religious alternative, they forfeit an important and extremely valuable benefit. If the decision below is reversed, the incentive effects will be eliminated, one way or the other. The decision will be left, as it should be left, to the family.

This is not to say that any government action that takes religion specifically into account is unconstitutional. Some programs or statutes – called "accommodations of religion" – "single out" religion for the entirely legitimate purpose of removing obstacles to religious exercise or otherwise facilitating independent choice. *Employment Division v. Smith*, 494 U.S. at 890 (exception from generally applicable laws would be permissible though not constitutionally required); *see Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding accommodation specifically targeted to religious organizations); *Gillette v. United States*, 401 U.S. 437, 454-60 (1971) (approving religious exemptions from military conscription). A contrary understanding leads to the anomalous consequence that an accommodation of religion that promotes the purposes of the Free Exercise Clause might be deemed unconstitutional. *See Wallace v. Jaffree*, 472 U.S. at 81-82 (O'Connor, J., concurring). This is a major source of supposed "conflict" between the Clauses. A proper understanding of what is a religious "effect" would make clear why accommodations of religion are not constitutionally objectionable.

We therefore submit that the effects test of *Lemon* should be clarified to focus on whether the law or program under challenge creates an *incentive* to engage in a religious practice. If the government creates no such incentive, then there is no establishment – even though religion may be "advanced" in the sense that obstacles to religious exercise are lifted.

3. *Coercion and endorsement.*

The position we espouse – that the effects test should be reformulated to prohibit government action that accords religious institutions or activities preferential treatment over nonreligious alternatives in a way that would induce or promote religious exercise – is consistent with both of the prominent alternatives to the *Lemon* test

proposed by members of this Court in recent cases: the "coercion test" and the "endorsement test."

The purpose of the coercion test is to ensure that the power of the government is not deployed to force or induce religious belief or behavior. *See County of Allegheny v. ACLU*, 492 U.S. 573, 659-63 (1989) (Kennedy, J., concurring in part); *Lee v. Weisman*, 112 S. Ct. 2649 (1992). That is precisely the objective of our proposed effects test. The allocation of resources is an important element of governmental power. It must not be used to favor (or to disfavor) religious exercise. Insofar as the allocation of resources is neutral between religion and secular alternatives to religion (as well as among religions), the coercive impact of government action will be minimized. In *Weisman*, the Court held that "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id.* at 2660. In this case, the school district's policy does what *Weisman* says it may *not* do – it exacts religious conformity from the Zobrests as the price for receiving their rights under the law to the services of a sign language interpreter. It is the denial of a sign language interpreter to an otherwise eligible student solely because he has chosen to attend a religious school – not the equal provision of services to all eligible students – that has a coercive effect which impairs religious freedom.

Similarly, under the coercion test, specific exemptions or accommodations of religion should be permitted when they are "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause." *Texas Monthly*, 489 U.S. at 18 n.8; *see also id.* at 15. In then-Associate Justice Rehnquist's words, "governmental assistance which does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice

does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause of the First Amendment." *Thomas v. Review Board*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting). Accordingly, it is appropriate to limit the effects test to instances in which government action would induce or promote religious exercise.

Our proposed reformulation of the effects test is equally compatible with the "endorsement" test. The purpose of the endorsement test is to "preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Wallace v. Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring). Our proposed modification of the effects test embodies that standard, since it is based on the proposition that government programs should neither be skewed in favor of religion nor discriminate against it. Laws that are *objectively* neutral toward religion could not "reasonably" be perceived as an endorsement. By contrast, the "religious use" standard violates the endorsement standard since it requires an active discrimination against religion. As this Court has pointed out in an opinion by Justice O'Connor, the nondiscriminatory administration of a general program of benefits conveys a message "of neutrality rather than endorsement." *Mergens*, 496 U.S. at 251. Indeed, exclusion of religious individuals or groups from neutrally available benefits "would demonstrate not neutrality but hostility toward religion." *Id.* at 248. Similarly, limitation of the effects test to government action that induces, and not merely accommodates, religious exercise is consistent with the endorsement standard. *Wallace v. Jaffree*, 472 U.S. at 82-83 (O'Connor, J., concurring).

The test we propose thus bridges the gap between the coercion and endorsement standards, while correcting the deficiencies of the fatally ambiguous effects test of *Lemon*.

B. Entanglement

The third part of the *Lemon* test prohibits laws or government programs that entail an "excessive entanglement" between government and religion. Perhaps even more than the effects test, the entanglement test has led lower courts astray, because, with all respect, this Court has never made plain what value is served by this part of the *Lemon* test.

In the complex modern world there necessarily will be numerous interactions between government officials and religious institutions. The ideal of "separation of church and state" does not mean, and cannot mean, that church and government have no contact. As Justice O'Connor has pointed out, "[t]he State requires sectarian organizations to cooperate on a whole range of matters without thereby advancing religion or giving the impression that the government endorses religion." *Aguilar*, 473 U.S. at 430 (O'Connor, J., dissenting). On the one hand, "entanglement" is necessary for the state to enforce its civil and regulatory law. Education agencies impose and enforce myriad curriculum, attendance, certification, fire, and safety regulations on sectarian schools, all of which involve some degree of "entanglement." *Wallace v. Jaffree*, 472 U.S. at 110 (Rehnquist, J., dissenting); *see also Hernandez v. Commissioner*, 490 U.S. 680, 696-97 (1989). On the other hand, "entanglement" is also necessary if religious institutions are to participate on equal terms in the benefits as well as the burdens of public life. In short: not all interactions between church and state are problematical. Yet, under the "entanglement" test as it now stands, lower courts are free to treat any form of interaction as an "entanglement" (or not), without any principled basis for distinction.

This case provides a ready example. The district court found that the provision of a sign language interpreter to a student attending a religious school would entail "excessive entanglement," in part because the public officials would have to engage in periodic evaluations

of the interpreter's work and of Jimmy's educational progress. Pet. App. A35; see Pet. App. A27-A33.[11] The court did not explain what distinguishes these routine regulatory contacts from any of the myriad contacts between church and state that happen every day. For the government to review Jimmy's educational progress is completely unexceptional; indeed, the accreditation process for private religious schools entails no less "entanglement" than this. And for the government to evaluate the performance of a government-paid worker does not threaten any of the values of the Establishment Clause (even if the evaluation takes place within a religious institution). *See Aguilar v. Felton*, 473 U.S. at 428-29 (O'Connor, J., dissenting).[12]

The lower court's treatment of the "entanglement" issue has roots in this Court's discussions of so-called "administrative entanglement." In *Aguilar v. Felton, supra*, for example, the Court stated that mere "administrative cooperation" between public and religious school personnel with respect to such matters as "schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program" is an unconstitutional entanglement. 473 U.S. at 413. See also Justice O'Connor's discussion of *Meek v. Pittenger*, 421 U.S. 349 (1975), at *id.* at 427. Yet these contacts are no

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[11] In its one page order, the district court did not explain the precise basis for its "entanglement" holding (Pet. App. A35), but Judge Tang's opinion in dissent in the court of appeals summarizes the arguments made by the school district (Pet. App. A27-A33).

[12] In this respect, *Aguilar v. Felton, supra*, and *Meek v. Pittenger*, 421 U.S. 349, 367-72 (1975), should be overruled. It is one thing to say that government supervision of the officials of a religious institution (as in *Lemon* itself) entails excessive entanglement; it is quite another to say that government supervision of a government worker entails excessive entanglement, just because it takes place on the premises of a religious institution.

different in kind from the administrative cooperation and communication needed in the context of administration of the tax laws (*Hernandez*, 490 U.S. at 696-97) or wage and hour laws (*Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985)), which the Court has unanimously upheld. It cannot be true that administrative entanglement is significant when a religious institution shares in a government benefit but not when it shares in the burden of taxation or regulation.

We therefore suggest that the concept of "entanglement" be expressly limited to governmental supervision or second-guessing of private speech or of activities or decisions by officials of religious institutions that have *religious significance*. In *Aguilar* itself, the Court explained that the entanglement test is "rooted in two concerns." 473 U.S. at 409. The first is that the "freedom of religious belief of those who are not adherents of that denomination suffers" when "the state becomes enmeshed with a given denomination *in matters of religious significance*." *Id.* The second is that the "freedom of even the adherents of the denomination is limited by the governmental intrusion *into sacred matters*." *Id.* at 410. Neither of these concerns is implicated when the interaction between state and church is confined to issues of no inherent religious significance. The "administrative entanglement" concept as applied in *Aguilar* thus outstrips the rationale for the doctrine. Properly understood, the provision of a sign language interpreter to Jimmy Zobrest is not problematical. Evaluations of the interpreters' work need not touch on issues of religious significance, and the evaluation of Jimmy's educational performance will likewise focus on secular and objective educational criteria. "Entanglements" of this sort are unavoidable and unobjectionable.

A more fundamental problem with the "entanglement" test is what this Court has called its "Catch-22" quality: the use of the entanglement doctrine to invalidate attempts to enforce the requirements of the effects test. *Bowen v. Kendrick*, 487 U.S. at 615; *see also Aguilar v. Felton*, 473 U.S. at 429-30 (O'Connor, J., dissenting);

Roemer v. Maryland Board of Public Works, 426 U.S. at 768-69 (White, J., concurring). *Amici* believe that this problem is principally created by the misinterpretations of the effects test, discussed above. Once it is recognized that the participation of religious institutions and individuals in neutral and generally available public benefits is not unconstitutional – that the question is whether the program is "skewed toward religion" and *not* whether a particular application of the program happens to benefit religion – the need for the monitoring and scrutiny that has been condemned under the entanglement test should come to an end. It remains true that the Constitution is offended when government agents in the course of an otherwise neutral program monitor private activities to detect any signs of religious teaching. Absent compelling justification, this should not be allowed; it violates the principles of free exercise and free speech.[13] But this sort of interference with the First Amendment rights of private individuals and organizations should not be the basis for suits by outsiders, as taxpayers, under the Establishment Clause. The victims of this form of unconstitutional activity are those being monitored, not their ideological opponents in the courtroom. To the extent (if any) that "entanglement" injures the interests of outsiders, it can more sensibly be assimilated within the "effects" test, as Justice O'Connor has suggested. *See Aguilar v. Felton*, 473 U.S. at 430 (O'Connor, J., dissenting). In other respects, entanglement should be recognized as a free exercise problem. *See* Douglas Laycock, *Toward A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81

[13] We reiterate that this analysis does not apply to programs in which government funds are provided to selected private institutions for the purpose of conveying a message from the government to the public. The government may monitor such institutions to ensure that the funds are not used to teach or promote religion, just as it may monitor its own employees. *See* note 9, *supra*.

Colom. L. Rev., 1373, 1383 (1981) "[(o)nly the church is harmed by (entanglement), and only it should have standing to complain"].[14]

IV. *Stare Decisis* Permits Reconsideration and Reformulation of the *Lemon* Test

Amici appreciate the weight that should be given to established precedent, but respectfully suggest that considerations of *stare decisis* do not stand in the way of rethinking and reformulating the test for establishments of religion. Even so faithful an advocate of adherence to precedent as Justice O'Connor has commented that she could not defer to precedents setting forth the entanglement doctrine because she "could discern [no] logical support for their analysis." *Aguilar v. Felton*, 473 U.S. at 427 (O'Connor, J., dissenting); *see also Wallace v. Jaffree*, 472 U.S. at 68 (O'Connor, J., concurring) ("[d]espite its initial promise, the *Lemon* test has proved problematic").

[14] We assume that the doctrine of "political entanglement" has already been repudiated by this Court. *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984) ("this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct"); *see also Bowen v. Kendrick*, 487 U.S. at 617 n.14; *Corporation of Presiding Bishop v. Amos*, 483 U.S. at 339 n.17; *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring). For a critique of the doctrine, *see* Edward McGlynn Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205 (1980). It would nonetheless be advisable for the Court to reiterate that this doctrine has been overruled. Many state and local government officials and lawyers, as well as lower courts, have not gotten the message. *See, e.g., North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1152 (4th Cir. 1991); *Cammack v. Waihee*, 932 F.2d 765, 781, *petition for rehearing denied*, 944 F.2d 466 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3027 (1992); *Spacco v. Bridgewater School Department*, 722 F. Supp. 834, 847-48 (D. Mass. 1989); *Board of Education v. Sanders*, No. 90 C 3063, 1991 U.S. Dist. LEXIS 6708, *41-*42 (N.D. Ill. May 15, 1991).

She has also proposed modifications in the "purpose" and "effects" tests of *Lemon*. *See id.* at 83 (O'Connor, J., concurring). Indeed, six Justices of this Court have expressly endorsed abandonment or modification of the *Lemon* test, and a seventh, by his conspicuous failure to cite *Lemon* in his separate opinion in *Lee v. Weisman*, 112 S. Ct. at 2667-78 (Souter, J., concurring), suggests that he, too, finds that test less than helpful. This is not surprising, since the *Lemon* test is so fatally ambiguous that it has produced wildly inconsistent results.[15]

From its inception, the *Lemon* test was not intended to be the exclusive or authoritative definition of establishments of religion. In the companion case to *Lemon*, *Tilton v. Richardson*, 403 U.S. 672 (1971), the author of *Lemon*, Chief Justice Burger, observed that "there is no single constitutional caliper that can be used" to determine the existence of an establishment and that the three parts of the *Lemon* test should be "viewed as guidelines" within which to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause." *Id.* at 677-78. This characterization has been reiterated many times over the years. *See Nyquist*, 413 U.S. at 773 n. 31 (calling the *Lemon* test a "guideline"); *Mueller v. Allen*, 463 U.S. at 394 (calling it "no more than [a] useful signpos[t]"); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area"). In two recent cases, the Court has decided Establishment Clause questions without even the pretense of reliance on *Lemon*. *Lee v. Weisman*, *supra*; *Marsh v. Chambers*, 463 U.S. 783 (1983).

The decision facing this Court is not whether to depart from settled precedent, but how to *reconcile* a mass

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[15] For a catalog of the inconsistencies of the Court's decisions in this area, see *Wallace v. Jaffree*, 472 U.S. at 110-12 (Rehnquist, J., dissenting).

of inconsistent cases and interpretations of unsettled doctrine. The goal should be to produce an approach to the Establishment Clause that is not at war with the Free Exercise Clause – an approach that is rooted in the historic purposes of the Clause to protect the People from the power of government to assert control over their religious decisions, institutions, and commitments. As this case so plainly illustrates, the *Lemon* test in its current formulation fails in that task. It invites lower courts to discriminate against religion in the administration of public programs, in violation of the principles of free exercise.

We therefore urge this Court to reverse the decision below and restore to Jimmy Zobrest and his family the rights guaranteed by the Education for Handicapped Children Act as well as the Free Exercise Clause. But in reversing the decision below, we urge this Court to take the opportunity to chart a new course that will reconcile the two Religion Clauses of the First Amendment around the overriding principle of religious liberty.

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APPENDIX

Statement of Interest

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,000 Christian attorneys, judges, law students and law professors with chapters in every state and at 100 law schools. Since 1975, the Society's legal advocacy and information arm, the Center For Law And Religious Freedom, has advocated both in this Court and in state and federal courts throughout the nation for the protection of religious speech and exercise.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration Of Independence, 1 Stat. 1 (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which being religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its

full and free exercise. Indeed, the Declaration states that citizens have a duty to rebel and establish a new government if this right (or any other inalienable right) is abridged by the state. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom: "Congress shall make **no** law . . . "

The National Association of Evangelicals is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The National Council of the Churches of Christ in the USA is a community of communions composed of thirty-two national religious bodies, Protestant and Eastern Orthodox, having an aggregate membership of more than 40 million adherents in the United States. It is governed by a board of some 260 members selected by its member communions in proportion to their size and support of the Council. The Council does not claim to speak for all of its adherents but seeks to carry out the wishes of their representatives as expressed in the policies they adopt through the General Board.

Among these policies was a historic resolution "On Federal Aid to Education" that helped to shape the "church-state settlement" that made possible the enactment of the Elementary and Secondary Education Act of 1965. It endorsed the "child benefit" theory underlying

Everson v. Board of Education (1977), thus permitting certain kinds of aid to flow to children attending parochial schools. That Act was amended in committee to incorporate certain restrictions designed to insure that the aid benefitted *children* rather than the *schools* they attended. Those amendments were informally referred to by members of Congress as the "Flemming Amendments" because they were suggested by the President of the NCC, Arthur C. Flemming, in testimony based on this resolution.

The limitations in the resolution, designed to keep the "child-benefit" concept from being completely open-ended, were as follows:

> 1. That benefits intended for all children be determined and administered by public agencies . . .
>
> 2. That such benefits intended for all children not be conveyed in such a way that religious institutions acquire property or the services of personnel thereby.
>
> 3. That such benefits not be used directly or indirectly for the inculcation of religion or the teaching of sectarian doctrine; and
>
> 4. That there be no discrimination by race, religion, class or natural origin in the distribution of such benefits.

The relief sought in this brief would seem to meet these criteria, with the possible exception of No. 3, which would stipulate that the sign-language interpreters supplied by the public school district not be involved in the teaching of religion.

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. The League is committed to ensuring the American people's continued enjoyment of the protections afforded religious freedom by the First Amendment to the Constitution, and it supports the religious freedom rights of Catholics and others through a wide range of activities.

The Southern Baptist Convention is the nation's largest Protestant denomination, with over 15.2 million members in over 38,200 autonomous local churches. The Christian Life Commission is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. The CLC seeks to advocate positions consistent with Southern Baptist convictions by filing briefs as *amicus curiae* in litigation important to these values, such as this case.

The Association of Christian Schools International is the largest association of evangelical Christian schools and colleges in the United States. Serving over 550,000 students, ACSI is dedicated to excellence in education that is Christian through the implementation of a Christ-centered philosophy of education. ACSI serves to promote professional excellence of teachers and administrators, a high level of student achievement and the rights of families with religious commitment to pursue biblically-based education for their children without the penalty of

loss of public benefits available to American families generally. ACSI strives to stimulate continuous spiritual and professional growth of school personnel, while defending and providing support for religious schools and the rights of the schools' parents and students in the area of legal/legislative concerns. This case articulates the legitimate need of religious school parents in trying to give their child the best education possible under difficult circumstances.

Family Research Council conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

The Church of Jesus Christ of Latter-Day Saints is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 8 million with more than 17,000 congregations located throughout the world. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." Article of Faith No. 11, The Church of Jesus Christ of Latter-day Saints.

Joni and Friends is dedicated to accelerating Christian ministry in the disability community. Founded by

Joni Eareckson Tada fourteen years ago, JAF Ministries works with churches throughout the United States and overseas in programs of evangelism and discipleship, integrating people with disabilities, churches, families and disability organizations. The World Health Organization estimates that at least 10%, or over 550 million people, have a disability, and as a group they are the poorest in the world with the lowest levels of education, employment, health care. The Christian Institute on Disability is one of the most recently developed programs of JAF Ministries, dedicated to scholarship, public policy and analysis on behalf of persons with disabilities.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eleventh largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The congregations of the Synod operate approximately 1,000 elementary and secondary schools situated in most of the states of the United States. The Synod, on behalf of its congregations, schools, and individual members, is concerned with situations in which individuals' freedom to exercise their religious preference and parents' rights to direct the religious upbringing and education of their children are infringed, such as in the instant case.
